

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.122 OF 1990

Baburao Ganpati Mali
since deceased by legal heir
Vishwanath Baburao Mali ..Appellant
(Original Plaintiff)

versus

1. Balasaheb Anna Patil,
Occ: Contract Business,
Res. of Mhaisal (S),
Tal:Miraj, Dist: Sangli.
2. The Chairman,
Shetkari Sahakari Sakhar Karkhana Ltd
Sangli, At Sangli ..Respondents

Mr.R.S.Apte for the Appellant

Mr.S.G.Page for the Respondent No.2.

**Coram : S.R.Sathe, J.
Dated : 27th March, 2006**

JUDGMENT.

1. Appellant, the Original Plaintiff in Regular Civil Suit No.199 of 1976 has preferred this Appeal against the Judgment and Order passed by the Court of 3rd Additional District Judge, Sangli in Civil Appeal No.94 of 1989 whereby the order passed by the 3rd Jt.C.J.J.D. Miraj dismissing the plaintiff's suit for permanent injunction restraining defendants from obstructing plaintiffs possession of the suit land and for mandatory injunction directing the

defendants to remove the Murum laid on the road in question was confirmed and appeal was dismissed. For the sake of convenience, hereafter the parties shall be referred to as plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under :

. On 3.6.1976 plaintiff purchased the land bearing survey No.449/5 Gat No.1991 situated at village Mhaisal, Taluka Miraj, District Sangli in auction and thereafter he got possession of the same on 26.6.1976. Few days thereafter he found that the defendants 1 and 2 had started constructing a road through his land. He, therefore, filed a suit simplicitor of permanent injunction and also prayed that the defendants be directed to remove the Murum which they have laid on the road in question.

3. The said suit was opposed by the defendants. They contended that the suit land was originally owned by one Narsingh Kulkarni and as he died without any heir the suit land was taken by the Government. Thereafter the village society was cultivating the said land for a period of about 10

to 12 years on behalf of the Government and then it was given to one Shinde, an ex-military man and lastly it was taken by the plaintiff in an auction sale. It is the contention of the defendants that since the time the said land was being cultivated by the society, one road was in existence in the suit land and the same was being used by the villagers of village Mhaisal, Kutwal and Dhawli. Thus, according to Defendant Plaintiff was not at all in exclusive possession of the road in question and as such he was not entitled to claim any injunction particularly when all the villagers were having right to use the said road.

4. On these pleadings the learned trial Judge framed issues. In order to prove the case the plaintiff examined himself. As against this the defendant examined in all three witnesses and also produced certain documents. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that though the land bearing survey No.449/5 is owned by the plaintiff he has failed to prove that he was in actual possession of the portion of the land on which there was a road. The learned trial Judge

also held that there is sufficient evidence to show that the said road was being used by the villagers for last more than 30-32 years. Naturally, he dismissed the plaintiff's suit for injunction.

5. Being aggrieved by the said decision the plaintiff filed the first appeal. The same also came to be dismissed. Hence plaintiff filed the present appeal.

6. From the perusal of the record it appears that while admitting the appeal the Court (Coram: Mohta, J.) has passed the following order:

. "Grounds 1 and 3 raises Substantial Question of Law. Admit."

. The said grounds are as under:

1> Whether in view of the fact that the appellant-plaintiffs the owner of the suit land, a decree of injunction ought to have been passed?

3) Whether in view of the proof of the

title of the appellant-plaintiff and in view of the fact that no easementary rights are claim by the defendants, nor they have any such rights, a decree for injunction should have been passed in favour of the appellant-plaintiff?

7. In this appeal before me Shri R.S.Apte, learned Advocate for the plaintiff has urged only two points. Firstly, he submitted that the learned First Appellate Court has not formulated proper question while deciding the said appeal. Secondly, he canvased before me that once it is held that the plaintiff is the owner of the suit land then the order refusing to grant permanent injunction was incorrect. He, therefore, submitted that the appeal be allowed and the plaintiff's suit be decreed. As against this, Shri S.R.Page, learned Advocate for the Defendant No.2 supported the judgment and order passed by the learned trial Judge.

8. From the perusal of the judgment of the First Appellate Court, it does appear that the said Court has not properly formulated the question to be

decided in the said appeal. However, from the perusal of the entire judgment it does appear that both the sides were fully aware as to the real points involved in the matter and both of them had made submissions on the said points. Not only that, but the First Appellate Court has considered the real point involved in the said matter, namely whether the road in question was in existence and if so since when and whether the defendants and the villagers were using the said road if so under what capacity or whether the same was in exclusive possession of the plaintiff. All these points have been considered by the First Appellate Court. So, merely because question was not formulated in a particular manner, it cannot be said that there is sufficient ground to allow the appeal. Hence, I am not inclined to accept the arguments advanced by the learned Advocate for the plaintiff in time.

9. It is not in dispute that the land in question was initially owned by one Kulkarni and thereafter it was taken by Government and for quite long time the same was being cultivated by the society. Thereafter, it was given to one Shinde, an ex-serviceman and ultimately the said land was

purchased in 1976 by the present plaintiff in auction sale. If we peruse the plaint it is very clear that the plaintiff has tried to show that there was no road at all in existence when he purchased the land and the defendants for the first time made an attempt to create a new road through his land and as such he filed the present suit. However, if we peruse the entire evidence on record then it is very clear that the plaintiff is trying to mislead the court because there is ample evidence on record to show that even at the time when the plaintiff purchased the property, the road in question was in existence. However, suppressing the said fact the plaintiff made a show to indicate that the new road is being created for the first time by the defendants. So, the learned trial Judge was right in observing that the plaintiff had not come to the court with clean hands and as such was not entitled to get the relief of injunction.

10. It is needless to say that title to the land bearing Survey No 449/5 is not at all a matter of issue in this appeal. The main question is whether there is a road which is going through the plaintiffs land and if so, since when it was in

existence and who were using the said road. From the perusal of the evidence of witnesses as well as from the 7 x 12 extract that have been produced on behalf of the defendants it is crystal clear that the villagers from village Mahisal, Kutwal and Dhawli were in fact using the said road even at the time when the land was being cultivated by the society. Not only that, but there is documentary evidence in the form of 7 x 12 extract which also goes to show that there is mention of Rasta Pad in the said extract. So, this is not a case where besides the interested words of defendants there is no other evidence. On the contrary, this documentary evidence clearly supports the defendants contention. Merely because the defendants have not specifically pleaded in certain terms that they have acquired the right of prescription in respect of the land in question, that would not make any difference if once it is proved that the road in question was being used by the villagers continuously, openly for a period of more than 35 years. That will also indicate that though the land in question was purchased by the plaintiff he was not actually put in possession of the road in question which was going through the said land. So, merely because the

plaintiff is having title to the suit land that does not mean that he is entitled for the injunction in question. A feeble attempt has been made on behalf of the plaintiff to show that some of the witnesses of the defendants have stated that there was crop in the entire land. It is needless to say that such stray admission will not help the plaintiff. If we read the entire evidence in its proper perspective then it goes to show that by giving such answer, all that the witness wants to indicate is that the entire land except road is being cultivated by the plaintiff and there is crop. So, I have absolutely no hesitation to hold that there is abundant evidence on record to show that on the date of the suit the plaintiff was not at all in actual exclusive possession of the suit road. On the contrary, the same was being used by the defendants as well as by the other villagers. Merely because there is some other way for going to the factory, that will also not make any difference so far as the fate of this suit is concerned. Thus, both the courts below have recorded concurrent finding of fact that the suit road in question is in existence for last several years and the same is in exclusive possession of the plaintiff. There is no necessity

to interfere with the said finding of fact. Thus, there is no substance in this appeal. The appeal is dismissed with cost.

(S.R.Sathe, J.)

pps.